SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-849

EDWARD GRIMES,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, EDWARD GRIMES, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of California entered in the above matter.

on September 22, 1971.

OPINIONS BELOW

The written decision of the Department of Alcoholic Beverage Control suspending Petitioner's license for 45 days is set forth in Appendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

Is the authority of the Department of Alcoholic Beverage Control overboard in violation of the First Amendment in that the Department may suspend or revoke a license for the presentation of entertainment which the Department finds to be contrary to public welfare or morals, without regard to whether or not the

entertainment is obscene."

STATUTORY PROVISIONS INVOLVED

Article XX, §22 of the Constitution of the State of California, which provices, in relevant part: "The department [of Alcoholic Beverage Control] shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals..."

Section 24200(a) of the California Business and Professions Code, which provides: "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

> "(a) When the continuance of a license would be contrary to public welfare or morals..."

STATEMENT OF THE CASE

Petitioner has been and now is the holder of an on-sale beer license issued by the California Department of Alcoholic

Beverage Control (A.B.C.) for the premises located at 10809 South Vermont Avenue, Los Angeles, California. Said premises are known as and do business as "The Circle."

On October 7, 1969, an Accusation was filed with A.B.C. alleging that petitioner had on seven separate occasions suffered and permitted acts at his licensed premises which violated a condition imposed upon his license and which were also, independently, "contrary to public welfare or morals" in violation of Article XX, §22 of the California Constitution and §24200(a) of the Business and Professions Code.

On November 13, 1969, petitioner duly filed a notice of defense pursuant to the California Administrative Procedure Act.

A hearing was held on the accusation on February 19, 1970 before a hearing officer who made a proposed decision to the A.B.C. The proposed decision found all of the seven alleged events had taken place and that four of them violated the condition. Only one of the alleged

events was found to be contrary to public welfare or morals. The hearing officer recommended that A.B.C. revoke petitioner's license.

On August 13, 1970 the A.B.C. adopted the proposed decision except for the penalty, which was reduced to a total suspension of 45 days.

On September 14, 1970, the A.B.C. denied petitioner's petition for reconsideration.

On September 22, 1970, petitioner filed his notice of appeal to the Alcoholic Beverage Control Appeals Board. Briefs were filed by both sides and a hearing was held by the Appeals Board on February 23, 1971. On July 23, 1971 the Appeals Board issued a written decision affirming the suspension of petitioner's license by the A.B.C.

On August 19, 1971, petitioner filed a Petition for Writ of Review with the Court of Appeals of the State of California. The petition was denied without a hearing on August 23, 1971.

On September 2, 1971, petitioner

filed a petition for hearing in the Supreme Court of the State of California. A hearing was denied on September 22, 1971.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

A Statute Which Permits Suspension or Revocation of an Alcoholic Beverage License for Acts Contrary to Public Welfare or Morals is Unconstitutionally Broad When Applied to Entertainment and Dancing Protected by the First Amendment.

The accusation against petitioner alleged that on three occasions he had employed the services of a female entertainer who performed on a stage while completely nude and that on four occasions he had employed the services of female barmaids and waitresses whose breasts were exposed. The A.B.C. found that only one of the occasions was contrary to public welfare or morals,

however. A.B.C.'s findings as to that occasion are set forth in Count I, paragraph 3 of its decision, which is set forth in Appendix A.

Petitioner contends that the operative clause, "contrary to public welfare or morals" is unconstitutionally broad when applied, as here, to dancing and entertainment. Zwickler v. Koota, 389 U.S. 241; In re Giannini, 69 Cal.2d 573, 72 Cal.Rptr. 655 (1968), cert. den.

The phrase "contrary to public welfare or morals" has been construed very broadly by the California Supreme Court, which has defined public morals to mean the moral practices of the entire community, which can be ascertained by reference to the criminal law, administrative rules of the A.B.C., but which may also include acts not forbidden by law. Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control, 2 Cal.3d 85, 84 Cal.Rptr. 113 (1970). In both this and other cases, the A.B.C. has taken the position that it may impose discipline for nude entertainment without having to prove that the

entertainment is obscene. Therefore, the A.B.C. asserts the right to prohibit expression otherwise permitted by the First Amendment.

It follows, then, that Article XX, §22 of the California Constitution and §24200(a) of the California Business and Professions Code as applied herein are overbroad restraints on speech since they wholly lack the precision and "narrow specificity" required of such restraints. NAACP v. Button, 371 U.S. 415 (1963); United States v. O'Brien, 391 U.S. 367 (1968).

II

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ,

Attorneys for Petitioner

APPENDIX "A"

APPENDIX A

STATE OF CALIFORNIA

DEPARTMENT OF

ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 30714
Reg. 9084

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issue and recommended penalty, adopted said proposed decision as its decision in the case therein described on August 13, 1970 except that said Department reduced the penalty from a revocation to a 15-day suspension on Count I and a 30-day suspension on Count II, said suspensions to be served consecutively for a total of 45 days.

A representative of the Department will call on you on or after October 1, 1970 to pick up the license certificate.

Sacramento, California
Dated: August 13, 1970

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-185 (8-65)

APPENDIX "B"

APPENDIX "B"

Filed Jul. 23, 1971
Alcoholic Beverage
Control Appeals Board

EXHIBIT B

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against

EDWARD GRIMES
dba The Circle
10809 South Vermont Avenue
Los Angeles, California

Respondent & Licensee

under the Alcoholic Beverage Control Act.

AB-3521

File No. 30814;
Reg. No. 9084

Time & Place of Hearing:
February 23, 1971, at 2 p.m.
107 South Broadway
Los Angeles, California

For Department:
Honorable Evelle J. Younger
Attorney General
Mark Leicester
Deputy Attorney General

For Appellant:
Kenneth Scholtz, Esq.

Appellant Edward Grimes, doing business as The Circle, has appealed the decision of the Department of Alcoholic Beverage Control that appellant's license be revoked pursuant to article XX, section 22 of the State Constitution, and sections

24200(a) and (b) of the Business and Professions Code.

Appellant filed a petition for reconsideration on the grounds (1) that the decision of the hearing officer of the Office of Administrative Procedure is not supported by the evidence in the case; (2) that errors of law were made by the hearing officer as reflected by the transcript of the proceedings; and (3) that the suspension of the license is excessive and that in lieu thereof a fine should be levied. The department denied said petition on September 14, 1970.

The appeal before this board is based upon the following grounds:

> "(a) The Department has proceeded without, and in excess of its jurisdiction;
>
> "(b) The decision is not supported by the findings;
>
> "(c) That errors of law were made by the Hearing Officer as reflected by the transcript of the proceedings;
>
> "(d) The findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"Within one year last past respondent-licensee directly and through his employees permitted the following acts, conduct and conditions to exist on the above-designated premises:

"1. On or about August 30, 1969, respondent did use the services of a female entertainer, Kathleen Walker, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"2. On or about September 7, 1969, respondent did use the services of a female entertainer, Ruth Ann Richard, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"3. On or about September 10, 1969, respondent did use the services of a female entertainer, Ruth Ann Richard, to perform on the stage area of the above-designated licensed premises, while completely nude, thereby indecently exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

"During said performance and before the said Ruth Ann Richard had completely disrobed, unknown male patrons shouted and made comments such as 'Hey, Rosie Cheeks, take off that fucking thing and let it all out' and 'Let me see that Brillo pad,' all of which was accompanied by much laughter and clapping of hands by patrons present.

"Also during said performance, the said Ruth Ann Richard did, while completely disrobed, turn her back, bend forward, place her hands on her bare buttocks, stretching them apart displaying her anal opening to the patrons present, some of whom were within three feet of the said performer.

"4. On or about September 7, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of a female, Mary Frances Crawford, and did permit and suffer the said female to tend bar and wait on

patrons while attired in a brief 'G-string' bottom covering only her pubic area, with her breasts fully exposed.

"5. On or about September 10, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of a female, Mary Frances Crawford, and did permit and suffer the said female to tend bar and wait on patrons while attired in a costume which fully exposed her breasts.

"6. On or about September 13, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of two females, Mary Frances Crawford, and Ruth Ann Richard, and did permit and suffer the said females to wait on patrons while attired in brief 'G-string' bottoms covering only their pubic areas, with their breasts fully exposed.

"7. On or about September 24, 1969, respondent licensee, in the above-designated licensed premises, did employ and use the services of two females, Patricia Curry and Mary Frances Crawford, and did permit and suffer the said females to wait on patrons while attired in brief bikini panties with their breasts fully exposed.

"COUNT II

"The above-designated license was issued to the respondent licensee for the above-designated licensed premises subject to the following conditions:

"'That Edward Grimes shall not employ the services of any female who exposes her bare breasts or bare buttocks or wears any manner of costume through which bare breasts or buttocks may be observed while performing any type of service within or upon the licensed premises when commingling with or waiting upon patrons.

"'Scantily clad entertainers will confine themselves to the stage area and not mingle with patrons. Other employees, such as waitresses, fashion models or independent contractors will be properly clothed, with topless or bottomless garments or other garb stressing nudity or near nudity being unacceptable.'

"DETERMINATION OF ISSUES PRESENTED:

"Count I, Subcounts 1, 2, 4, 5, 6 and 7: Grounds for disciplinary action were not established under Article XX, Section 22 of the State Constitution and Section 24200(a) of the Business and Professions Code.

"Count I, Subcount 3: Respondent violated Section 24200(a) of the Business and Professions Code.

"Count II: Respondent violated Section 23804 of the Business and Professions Code.

"Grounds for suspension or revocation of respondent's license were established under Article XX, section 22 of the State Constitution and Sections 24200(a) and (b) of the Business and Professions Code and under the findings herein."

Based on the department's decision, this appeal is limited to subcount 3 of Count I, determined to be a violation of section 24200(a) of the Business and Professions Code and count II, held to be a violation of section 23804 of the Business and Professions Code (violation of a condition placed upon a license).

Appellant concedes that the record contains substantial evidence supportive of the department's findings. (Appellant's opening brief, p. 1.) Accordingly, there is no need to set forth such evidence in this decision.

In his appeal, appellant raises the following issues:

(1) The condition imposed upon appellant's license was not valid and could not be used as a ground for disciplinary action.

(2) The provisions of article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code, which permit the department to revoke a license for conduct "contrary to public welfare or morals", are unconstitutionally broad when applied to speech and expression protected by the First Amendment, as in paragraph 3, count I, of the accusation herein.

(3) The decision of the department is not supported by substantial evidence in light of the whole record or the findings in that neither the findings nor the evidence contained facts tending to show that the acts complained of were contrary to public welfare or morals or that the acts set forth in the first three paragraphs of count I were contrary to the conditions imposed upon appellant's license.

We find no merit in appellant's

argument that the condition imposed upon appellant's license was not valid. The record shows that on or about December 15, 1967, appellant did petition for a conditional license and such license issued on or about December 26, 1967.

For the record, we would point out that section 23800 of the Business and Professions Code (license conditions) clearly delineates that conditions are imposed upon request of the licensee and that such conditions may cover any matter relating to the privileges exercised under license, conduct of the business, or the condition of the premises, which will protect public welfare or morals. (Section 23801, Business and Professions Code.) Appellant petitioned for a conditional license; i.e., voluntarily relinquished his right to appeal, and knowingly agreed to the terms affecting operations on the licensed premises. Consequently, there is no merit in appellant's contentions that the condition imposed was invalid and

consequently may not serve as a basis for disciplinary action.

This board in numerous previous decisions has passed upon the question here raised by appellant as to the constitutionality of article XX, section 22, when applied to speech and expression protected by the First Amendment. In passing upon appeals involving conduct similar to that set forth in the instant findings (subcount 3), we have stated that such cases belong to a classification which this board has held to be within the ambit of close regulation by the department on the basis of article XX, section 22 of the California Constitution.

It is the opinion of this board that in the instant matter, the Director, in determining that the entertainer's conduct was contrary to public welfare or morals, drew a legal inference from undisputed facts. His determination was not erroneous as a matter of law. Furthermore, it is our opinion that no

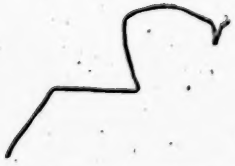
reasonable person could claim that the entertainers and patrons (subcount 3) have a constitutional right to engage in such conduct in a beer bar.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
July 23, 1971



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Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

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Response in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

Respondents respectfully request that the writ of certiorari be denied in the above entitled case. Jurisdiction of the Court is invoked by the petitioner under 28 U.S.C.A. section 1257(3). Respondents contend that this Honorable Court has no jurisdiction in that this case does not present a substantial federal question.

Questions Presented

1. Is the authority of State government to regulate use and control of alcoholic beverages in conjunction with conduct contrary to public morality limited to instances in which obscenity can be proven.

2. Are statutory provisions authorizing the California Department of Alcoholic Beverage Control to suspend or revoke an alcoholic beverage license for conduct which is contrary to public morality, after notice and hearing, unconstitutionally overbroad.

Statutory Provisions Involved

The statutes pertaining to petitioner's contentions are as follows:

United States Constitution, First Amendment;

United States Constitution, Fourteenth Amendment;

California Constitution, Article XX, section 22;

California Business and Professions Code, section 24200(a).

Respondents' argument raises the applicability of the Twenty-First Amendment of the United States Constitution.

History of the Case

Following notice and hearing, a decision of respondent Department of Alcoholic Beverage Control, hereinafter referred to as "the Department," suspended petitioner's alcoholic beverage license for a period of 15 days for a violation of section 24200(a) of the Business and Professions Code of the State of California. Petitioner's license was further suspended for a period of 30 days for failure to comply with conditions of the license in violation of section 23804 of the Business and Professions Code of the State of California. (Pet. Appendix A, Appendix B p. B-7.) The decision of the

Department was affirmed by respondent Alcoholic Beverage Control Appeals Board in a decision dated July 23, 1971. (Pet. Appendix B.)

Petitioner's petitions for writ of review to the California Court of Appeals and petition for hearing to the California Supreme Court were denied on August 23, 1971, and September 22, 1971, respectively.

Factual Statements

The facts upon which the petition in this case is based are set forth on pages B-3 through B-6 of Appendix B to the Petition.

ARGUMENT

I

The Regulation of Conduct Contrary to Public Morality in Connection With the Use of Alcoholic Beverages Constitutes a Substantial Governmental Interest Which Justifies Incidental Limitations on First Amendment Freedoms

The enactment of laws for the protection of the public morality is one of the traditional powers of government which falls within the police power of the State. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *cf. Vallerga v. Dept. Alcoholic Bev. Control*, 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494, 347 P.2d 909 (1959). Petitioner argues that since the conduct in question occurred in the context of nude entertainment, the power of the government to regulate is limited to instances where obscenity can be proven.[1] (Pet. p. 8.) The California Supreme Court has held that nude entertainment is a form of expression which potentially is protected by the First Amendment. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968). Petitioner makes the false assumption that the inquiry concerning governmental power to regulate ceases where the improper conduct occurs in the context of nude entertainment. The *Giannini* decision makes clear that petitioner's analysis is incorrect. The Court stated:

> "Indeed, the concepts of 'potential' and prima facie First Amendment protection are becoming increasingly important in areas other than obscenity law. The restricted and literal approach

[1] Contrary to petitioner's contention, the discipline of petitioner's license was not for presenting nude entertainment.

> to the definition of speech protected by the First Amendment is gradually being replaced by an emphasis on the interest in communication, whether or not promoted by conduct that is precisely speech. The protection of this interest depends upon a balancing process: the weighing of the interest of the state in suppressing or regulating the questioned conduct as against the opposing interest in the interchange of ideas. [Citations.] California's obscenity law here at issue represents merely a particular, albeit well-established, example of this balancing of interests to determine whether First Amendment guarantees apply to a particular example of communication or whether sufficiently important state interests dictate a contrary result." *Supra* at 569, n. 2

The question, then, is to what extent may the traditional power of government to enact legislation for the protection of the public incidentally intrude upon a form of expression which potentially is protected by the First Amendment. The scope of the licensing power of government as it relates to conduct potentially protected by the First Amendment was articulated in *Konigsberg v. State Bar*, 366 U.S. 36, at 49-51, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), as follows:

> "At the outset we reject the view that freedom of speech and association [citation], as projected by the First and Fourteenth Amendments, are 'absolutes' . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered

> outside the scope of constitutional protection. [Citations.] On the other hand, *general regulatory statutes*, not intended to control the content of speech but *incidentally* limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by *subordinating valid governmental interests*, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." (Emphasis added.)

Section 24200(a) of the Business and Professions Code of the State of California is a general regulatory statute which does not attempt to regulate First Amendment conduct. Article XX section 22 of the California Constitution is a state constitutional provision of essentially the same nature. As applied to conduct occurring in the context of nude dancing, the limitations on expression are only incidental to the regulation of nonspeech elements. In the case of *United States v. O'Brien*, 391 U.S. 367, at 376-77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), this Court stated as follows:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeach' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To character-

ize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." (Emphasis added.)

This Court has only recently affirmed that the police power of the State over intoxicating liquors was extremely broad even before the adoption of the Twenty-First Amendment. *Wisconsin v. Constanineau*, 400 U.S. 433, 436, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). The State is justifiably concerned with the evils associated with conduct contrary to public morality in association with the use of alcohol. Recent State court decisions have recognized the validity of this concern. *People v. Lindenbaum*, 11 Cal. App. 3d Supp. 1, 5-6, 90 Cal. Rptr. 340 (1970); *City of Portland v. Derrington*, 253 Ore. 289, 451 P.2d 111 (1968), *cert. den.*, 396 U.S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177. *See also Hoffman v. Carson*, 250 So. 2d 891 (Fla. July 7, 1971), *cert. den., appeal dismissed*, U.S.S.C. 4 L.W. 3264, 3241.

The existence of the Twenty-First Amendment demonstrates the substantiality of the state's interest and power with regard to use of alcoholic beverages.

> "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for [the state] to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less. [Citation.] The State may protect her people against evil incident to intoxicants, [citations]; and may exercise large discretion as to means employed." *Ziffrin, Inc. v. Reeves,* 308 U.S. 132 at 138-39, 60 S. Ct. 163, 84 L. Ed. 128 (1939).

Therefore, State government has a valid interest in regulating the nonspeech elements of petitioner's conduct as it occurs in connection with the use of alcoholic beverages, justifying incidental limitations on freedom of expression.

II

The Provisions of the California Business and Professions Code Section 24200(a) and Article XX Section 22 of the California Constitution Authorizing the Department of Alcoholic Beverage Control of the State of California to Suspend or Revoke a License for Conduct Contrary to Public Morality, as Construed by the Courts of the State of California, Are Not Unconstitutionally Overbroad

Petitioner extends that section 24200(a) of the Business and Professions Code of the State of California and Article XX section 22 of the California Constitution lack the precision and "narrow specificity" required of statutes governing the exercise of First Amendment activities.[2] (Pet. p. 8.) Petitioner's contention is

[2]For the sake of convenience, discussion will hereinafter be directed to section 24200(a). All such discussion equally applies

in large measure based on the holding of this Court in *N.A.A.C.P. v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

Section 24200(a) on its face is not a statute aimed at conduct involving First Amendment activities. The statute can be and has been applied to a wide variety of conduct. *Harris v. Alcoholic Bev. Con. Appeals Bd.,* 212 Cal. App. 2d 106, 28 Cal. Rptr. 74 (1963) (repeated instances of intoxication of patrons); *Reimel v. Alcoholic Bev. etc. Appeals Bd.,* 252 Cal. App. 2d 520, 60 Cal. Rptr. 641 (1967) (acceptance of gambling bets on licensed premises); *Copeland v. Dept. of Alcoholic Bev. Control,* 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (1966) (conviction of crime involving moral turpitude); *Adler v. Dept. Alcoholic Bev. Control,* 174 Cal. App. 2d 256, 344 P.2d 336 (1959) (sexual solicitations and touching between employee and patron); *Mercurio v. Dept. Alcoholic etc. Control,* 144 Cal. App. 2d 626, 301 P.2d 474 (1956) (acceptance by waitress of alcoholic beverages from patrons); *Maxwell Cafe v. Dept. Alcoholic Control,* 142 Cal. App. 2d 73, 298 P.2d 64 (1956) (numerous public homosexual acts).

Section 24200(a) is not a censorial statute. Nor is it a statute which licenses freedom of expression. The strict standards of narrow specificity which this Court has required in such cases as *N.A.A.C.P. v. Button, supra,* are applied to statutes falling in the category of regulations of First Amendment activity. *Burton v. Municipal Court,* 68 Cal. 2d 684, 691, 68 Cal. Rptr. 721, 441 P.2d 281 (1968). In contrast to statutes which

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to Article XX section 22 of the California Constitution, since the wording of the provisions for purposes of this case are substantially the same.

censor or license free speech, general regulatory statutes, not on their face regulating speech, are not overbroad or vague even though there may be possible situations in which they may apply to freedom of speech or association. In such instances, the function of courts is to assure that the application of the statute does not infringe upon protected free speech. *United States v. Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969).

The argument that a statute which could possibly be applied to protect expression must be voided on its face, carried to its logical conclusion, would require wholesale invalidation of statutes even when the court can adequately assure that the statutes can be properly applied.

> ". . . it is very easy to read a statute to permit some hypothetical violation of civil rights but difficult to draft one which will not be subject to the same infirmity." *Kunz v. New York*, 340 U.S. 290, 304, 71 S. Ct. 312, 95 L. Ed. 280 (1951) (Jackson, J., dissenting).

Consequently, in cases of statutes not on their face regulating expression, the court, where possible, has construed the statute in question as not applying to protected activity and has determined whether constitutionally protected rights are infringed upon in the particular case.[3] *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (burn-

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[3]As argued in Argument I, petitioner's conduct was not protected in this case.

ing draft card not constitutionally protected expression); *Adderley v. Florida*, 385 U.S. 39, 41-43, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) (state trespass statute not overbroad or vague where aimed at conduct of a limited kind not protected by the First Amendment); *Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) (Sherman Act does not apply to lobbying activities); *United States v. Spock, supra*, (conspiracy law not unconstitutional on its face); *cf. Poulos v. New Hampshire*, 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953) (statute licensing First Amendment activity, as construed by state court, did not unduly infringe on freedom of expression).

Respondents thus submit that the better approach to the issue of overbreadth of a general regulatory statute is to determine whether the statute can reasonably be expected to be applied in a manner which does not encroach upon constitutionally protected expression. The California Supreme Court has construed section 24200(a) in a manner which assures its proper application. In determining the issue of overbreadth, this Court takes into account the construction placed upon a state statute by its highest court. *Poulos v. New Hampshire, supra* at 345 U.S. 402.

In *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 84 Cal. Rptr. 113, 465 P.2d 1 (1970), the California Supreme Court addressed itself to the scope of section 24200(a). The Court stated in that case:

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corrupted, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." *Supra* at 2 Cal. 3d 101.
>
> "The constitution formulates the standards for departmental action in terms of public morals. This does not imply that the subjective moral notions of the Department iself necessarily express or reflect actual public morality. Rather, the modifying adjective 'public' necessarily indicates the obligation to apply an objective standard." *Supra* at 2 Cal. 3d 103.

Under the *Boreta* decision, a licensee is not to be denied any privileges under the license until, after notice and hearing, it is affirmatively established that the licensee's conduct falls within the domain properly cognizable by government regulation, justifying thereby the incidental limitation on freedom of expression.

Therefore, section 24200(a) of the California Business and Professions Code is not unconstitutionally overbroad or vague, since the statute is not a regulation of expression and, as construed by the California Supreme Court, can not be applied in a manner which infringes on constitutionally protected expression.

Conclusion

The petition does not present a substantial federal question in that:

1. Petitioner's conduct in this case was not protected by the First Amendment.

2. Section 24200(a) of the Business and Professions Code cannot be applied to constitutionally protected expression.

For these reasons, respondents request that the petition for certiorari be denied.

Respectfully submitted,

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